

– but not in regard to ends (or ‘ultimate values’) – can be tested by social scientific analysis. An assessment of means encourages one to be ‘conscious of the fact that *any* action ... will have consequences that imply *taking sides*’.¹⁶ Those who act ‘responsibly’, Weber wrote, must weigh ‘the goal of his action against its consequences’. The question for social scientific judgment, then, is whether the ends justify the ‘ultimate’ means.¹⁷ The social scientist assumes the ‘duty of creating clarity and a sense of responsibility’ about the consequences that follow from prescribed actions.¹⁸ It follows that there is a scholarly responsibility to evaluate the contending sides to an argument and, where evidence leans clearly in one direction and not in another, to say as much.

It is not enough, then, merely to describe debates when the contending sides have better or worse arguments. The authors appeal to the fact that there are (to borrow from Weber again) gods forever warring over the terms of investment law that are irreconcilable and, therefore, incapable of being placated by scholarly research. They dutifully, if inconsistently, decline to choose which, among those gods, to serve.¹⁹ Yet the authors also have a responsibility to clarify, rather than relativize, these clashing positions in so far as they have empirically verifiable evidence in their support. If *Political Economy* admirably succeeds at acknowledging those contending views, the book sometimes falls short of providing guidance about which arguments, in support of those views, is more compelling than others.

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José E. Alvarez, ***The Impact of International Organizations on International Law***. Leiden: Brill/Nijhoff, 2017. Pp. 479. ISBN: 9789004328457.

Any book authored by José E. Alvarez is a must-read for an international lawyer interested not only in international organizations (IOs) but also in the way international law works today. And this one is no different. *The Impact of International Organizations on International Law* may be read as an updated and refined restatement of Alvarez’s position on ‘how institutionalization has affected the making, the interpretation, the contents, and the effect of international law’ (at vii). It is a topic he first explored in his 2005 book *International Organizations as*

¹⁶ Weber, ‘The “Objectivity” of Knowledge in Social Science and Social Policy’, in H.H. Bruun and S. Whimster (eds), *Max Weber: Complete Methodological Writings* (2010) 100, at 102 (emphasis in original).

¹⁷ Weber, ‘Science as a Profession and Vocation’, in Bruun and Whimster, *supra* note 16, 335, at 350. Those ultimate values were, however, ‘cultural questions’ that were ‘less amenable’ to ‘unambiguous solution’ in Weber, *supra* note 16, at 104.

¹⁸ Weber, *supra* note 17, at 350. On the ethic of responsibility in scholarly pursuits, see the fleeting reference in Weber ‘The Profession and Vocation of Politics’, in P. Lassman and R. Speirs (eds), *Weber: Political Writings* (1994) 309, at 360, and discussion about the responsibility of all ‘human action’ in K. Löwith, *Max Weber and Karl Marx*, translated by Hans Fantel (1982), at 46–47.

¹⁹ Weber, *supra* note 17; Weber, ‘Between Two Laws’, in Lassman and Speirs, *supra* note 18, 75, at 79.

Law-Makers and one he has been teaching since 1989.¹ This new monograph is based on the general course Alvarez gave at the Xiamen Academy of International Law in 2013. It extends to the reader the unique benefits of having grown out of a teaching exercise. This is the case, in particular, with respect to the selection of the material that is covered in 423 pages and to the complexity reduction that necessarily comes with having to convey a clear message about a nebulous set of practices.

The book presents itself as being concerned with 'the future of international law' and identifies the 'challenges' IOs pose to 'legal positivism', 'traditional conceptions of sovereignty' and 'the rule of law itself' (at back cover). The reader will not be disappointed. The monograph, written in Alvarez's characteristic style, is riveting in its argument and extremely rich and nuanced in the information it processes. The argument unfolds in six chapters. The first presents what Alvarez sees as 'the most dominant framework for understanding international law' (at 47) – that is, legal positivism – and what he depicts as the 'institutional challenge' to that framework. The sixth, and concluding, chapter revisits and refines that challenge as the first challenge posed by IOs (at 345), before adding two more: the 'IO challenge to sovereignty' (at 385) and the 'IO challenge to the rule of law' (at 398). The other four chapters cover examples of IOs' impact on international law: the second and third chapters pertain to law-making by the United Nations (UN) and, in particular, the UN Security Council in Chapter 2 and the UN General Assembly in Chapter 3; the fourth chapter focuses on law-making by a specialized agency, the World Health Organization; and the fifth chapter addresses international adjudication in a generic fashion.

The book's argument revolves around what it refers to as the 'institutional challenge to [legal] positivism' (at 18, 345). Alvarez contends that 'the law-making activities' of IOs 'cast doubt on propositions that international law is established only on the basis of the consent of states, emerges only from the three sources of obligation contained in Article 38 of the International Court of Justice Statute, can be easily distinguished on the basis of its clearly binding authority, and can be understood without the need to draw on non-legal disciplines' (at 345). Instead, according to Alvarez, understanding international law requires 'drawing on the insights of those who study institutions' and bureaucracies (at 345), both domestically and globally (at 346). Being attentive to 'institutionally generated law' in this way should enable one, Alvarez argues, 'to consider the characteristics of the law produced by these institutions, rather than beginning with a preconceived idea of what those obligations need to be and then attempting to fit the complex legal products of contemporary IOs within it' (at 346–347).

Interestingly, the book also introduces important nuances and caveats to this argument at the end of Chapter 1 (at 45–52) and reiterates them at the end of Chapter 6 (at 422–423). In this concluding section, Alvarez emphasizes two 'contradictory aspects of the age of IOs'. On the one hand, states are transformed by IOs, including with respect to their sovereignty, but they are 'hardly displaced as primary law-making actors' (at 385). On the other hand, even if certain IOs purport to promote the rule of law, their bureaucracies also 'pose formidable challenges to it' (at 398, 409). Drawing on these tensions, the book concludes with a much more modest claim than the one it started with. Alvarez's opening line of argument was that IO law is law (without quotation marks) and that dominant international legal theories cannot account for it (at 1, 345–347). Instead, in the book's conclusion, and in a more cautious tone, Alvarez actually calls on 'international law scholars' to 'provid[e] a satisfactory and widely accepted test for determining when informal processes [such as IOs]

¹ J.E. Alvarez, *International Organizations as Law-Makers* (2005).

produce something worthy of being called (and treated as) “international law” [with quotation marks]’ (at 423). This, Alvarez continues, would then make it possible for authors like him to convince people ‘that the “law” produced by IOs is effective and that IOs can be held “accountable”’ (at 423).

I have learned a lot from reading the book. My concerns about its thesis are mainly of a theoretical kind and pertain to two issues: first, the framing of the book’s argument and, second, the conception of legal theory underpinning it. The critique to come should be read as a tribute to the quality of the book and to the urgency of the questions it raises for the institutional future of international law.

First of all, the book sets out to address the ‘impact’ of ‘institutionalization’ (or ‘IOs’, as both are used interchangeably [at 44, 47, 345, 352]) on ‘international law’ (book title). Its starting point is that ‘institutionalization’/‘IOs’ and ‘international law’ are separate concepts. This framing affects not only the book’s analysis of the various challenges IOs pose to international law but also the proposals it makes to address it. Part of the problem Alvarez (rightly) wants to tackle, indeed, is the alleged lack of institutional concern on the part of (most) international lawyers (and international legal theorists). The difficulty, however, is that this very disconnect between law and institutions actually also underlies the general framework he uses to approach international law in the book and that he thereby perpetuates (at 19–20).

Contrasting and opposing international law (or ‘rules’ [at 3–4, 36] made by states) and international institutions (epitomized by IOs [at 345]) in this way raises two problems. It curiously assumes that, first, states are not institutions of and for international law and that, second, institutions like IOs are not made of international law and dependent upon it. Starting with the latter, on the one hand, international law rules and institutions (including states and IOs) are intimately related. It has become increasingly difficult to conceive of either of them without the other; while it is, strictly speaking, possible to think of institutions that are not law-based and of laws that are not institution-related, modern (domestic and international) law (*qua* states’ law), at least in the Western tradition, is institutional, and modern (domestic and international) institutions (*qua* states or state-based institutions) are legal.² This makes any attempt at delineating the ‘impact’ of IOs on international law from the reverse question of the international legal constitution of IOs naive. Addressing the former relation without the latter would therefore necessarily be incomplete.³ As a matter of fact, many contemporary (domestic and international) legal theorists, including the legal positivists whom Alvarez criticizes, have long emphasized the institutional dimension of legal norms in their legal theory and the complexity this generates for theorizing (domestic and international) institutions separately from the laws that make them and which they make in return.⁴

As for the institutional nature of states in international law, on the other hand, it is often overlooked by international lawyers working on IOs, including Alvarez.⁵ This is surprising to

² This may explain why Alvarez restricts the scope of his institutional argument to international organizations (IOs) that are ‘inter-state’ (at 28, 47) and can therefore be related back to states institutionally. He does not clearly justify that choice, however, and seems to want to keep all options open regarding the international law-making role of other ‘non-state entities’ (at 28–29).

³ For an attempt to embrace both international law and institutions at the same time, see, e.g., Besson and Martí, ‘The Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation’, 9 *Jurisprudence* (2018) 504.

⁴ See, e.g., albeit in different ways, Raz, ‘Why the State?’, in N. Roughan and A. Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (2017) 136; McCormick, ‘The Legal Framework: Institutional Normative Order’, in *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999) 1; R. Collins, *The Institutional Problem in Modern International Law* (2016); A. von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010).

⁵ For an exception, see, e.g., P. Reuter, *Institutions internationales* (1963), at 103ff.

the extent that what underpins most controversies pertaining to IOs in international law today is the latter's (legal and institutional) relationship to (member, but especially third) states. Functionalism (for example, at 351 and in Chapter 5) has famously been blamed for preventing international lawyers from addressing how IOs relate to states other than their member states.⁶ It also obfuscates, therefore, how IOs may be said to contribute to the making of general international law, both as general international lawmakers and as general international legal subjects. Uncovering the legal and institutional relationship between states and IOs could therefore help to deal with many of the questions discussed later in the book such as the sovereignty and rule-of-law challenges that Alvarez claims are posed by IOs. Nowhere, however, is the state–IO institutional relationship addressed as such in the book (or only at the very end and solely in terms of 'powers' [at 422]).

An explanation for Alvarez's conceptual separation between international law and institutions and between states and IOs may be that, like other international lawyers, he relies too heavily on the economic and technical notion of (global) 'governance' (at 21) (instead, for example, of government) when describing the 'reality' of international 'institutionalization' (at 19–29).⁷ However, neither does he state what governance actually amounts to or how governance ties in with all of the international institutions we have, including states and IOs. As a matter of fact, there are so many conceptions of 'governance' available in the literature cited by Alvarez that it is difficult at times to follow what it refers to, especially with respect to international law-making (at 19–29). The term applies interchangeably to all kinds of IOs and international institutions like ICs, and is used, for instance, to mean 'political impact' (at 21), 'autonomous normative action that has an impact on how states or international organisations regulate themselves' (at 311), but also simply 'law-making' (at 285), thereby seemingly contradicting the opposition between international courts' (ICs) 'law-making functions' and 'governing functions' made in Chapter 5. Generally, I fear that the notion may have become a distraction in the field of international institutional law. It has become a placeholder that keeps international lawyers from taking international institutions as seriously as Alvarez rightly claims we should. Ultimately, perhaps, relying on the notion of global governance may have served to make the book as blind to the institutional dimension of all forms of (international) law as the legal positivists it (wrongly) blames for it.

The second, albeit related, matter I would like to take issue with is the book's approach to legal theory. One would expect a book dedicated to (changes in) international law-making to rely on a solid legal theory – just as one would expect it to have a good theory of what international institutions amount to, as I explained before. Instead, what the book does is sketch, and then criticize, what it takes to be the most influential international legal theory – that is to say, legal positivism – but without providing an alternative one. Not only is the description of legal positivism caricatural and, as result, not as dominant as claimed, but the absence of any alternative also leaves a big gap in the argument.

With respect to the book's critique of 'legal positivism' (at 1), one may not exclude that some legal positivists could defend some of the four tenets of legal positivism (the 'ideal type' [at 8]) identified by Alvarez: consent-based legal validity; separation between law and morality; source-based scientific reasoning; and closed-off systematicity (at 1, 2–17). It is clear, however, that they need not do so to be qualified as legal positivists and vice-versa. Of course, this may simply be a matter of how those tenets are described by Alvarez, and he actually concedes as much (at 18–19). However, I fear that it may not be that beneficial to the debate to frame what one sees as

⁶ See, e.g., J. Klabbers, *An Introduction to International Organizations Law* (3rd edn, 2015), at 2–6.

⁷ For a discussion, see, e.g., A. Supiot, *Homo juridicus: Essai sur la fonction anthropologique du Droit* (2005), at 227.

the 'dominant framework for understanding public international law' (at 47) in a way that no one is defending as such and then to identify challenges to a straw man. Worse, that straw man is not only referred to as a 'positivist' but sometimes also as a 'traditional positivist', with tradition being flagged as the ultimate *faux pas* but without much of an explanation for this pejorative assessment of tradition (at 358).

Most importantly, the book does not offer any alternative to the (caricature of) legal positivism that it attacks. Instead, it calls on other international lawyers to provide such an alternative (at 423). It is difficult to understand, however, how the book could discuss 'institutionally generated law' (at 346) without, at the same time, developing a corresponding concept of law. Tellingly, the first part of the book resorts to the terms 'law' or 'legal' without quotation marks and progressively applies those marks to them as it moves forward (contrast, for example, 28, 47, 345 with 415–416, 421–423; see also the reference to '*de facto* law-makers' [at 394]).

Of course, Alvarez may claim that all he wants to do is reveal the IO challenge to his understanding of the dominant international legal theory, without venturing proposals as to how to fix it (at 18–19). However, even that claim fails to convince. The book opposes 'theory' (epitomized by legal positivism) with 'reality' (epitomized by IOs or 'institutionalization' more broadly) (at 8, 19, 370). The problem is that such a stark opposition between theory and reality is difficult to accept with respect to a normative practice and especially an institutional one such as law. There is no good theory of law that would not aim at being part of the law as it is practised normatively and institutionally. Conversely, there is no good normative and institutional practice of law that does not come with a legal theory thereof. International law is no exception in this respect.⁸ If certain features of international law are reflected in international law theory, positivist or not, it is because they are in practice and vice-versa (at 420).

As a result, and contrary to what Alvarez appears to think (at 346–347, 409–410), few international legal theorists would claim that it is possible or desirable to begin with a pre-conceived idea of what legal obligations need to be and then attempt to fit the complex legal products of contemporary IOs within it. However, it would be equally misguided on the part of an institutional legal theorist of the kind advocated by Alvarez to assume, conversely, that she should first gather the facts about IO law and then provide a legal theory of those facts (at 423). (International) law is not merely a set of natural facts against which a theory can be tested. It is odd, therefore, to consider, like Alvarez, that one may describe a certain legal practice without expressing at the same time some form of normative assessment of that practice as a participant in that practice (at 48). The 'theoretical' and the 'real' go hand in hand in the normative practice of international law. Contrary to what the book argues, legal theory simply cannot provide a 'test for determining when informal processes [such as IOs] produce something worthy of being called (and treated as) "international law"' (at 423).

Neglect of this strong and mutual connection between theory and practice in international law may explain why the book concludes by seemingly reverting to a position it had ruled out at the outset of the enquiry. By concluding that the international norms produced by IOs may not after all be of a legal kind (at 409–410, 412), the book seems to end where it should have started; it begs the question of the international institutional legal theory it needed to present and discuss the practice of international law *qua* law.

The theoretical concerns expressed in this review do not detract from the quality of the survey and assessment of the current institutional practice of international law offered in the book. As always, Alvarez captures very astutely the state of the debate about IOs and how they may

⁸ See Besson, 'International Legal Theory *qua* Practice of International Law', in J. d'Aspremont, A. Nollkaemper and T. Gazzini (eds), *International Law as a Profession* (2017) 268.

or may not be said to contribute to international law-making. International lawyers should all respond to the book's call for future research. We urgently need an international legal theory that accounts for (all) international institutions and their practice.

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Juan Pablo Scarfi. ***The Hidden History of International Law in the Americas: Empire and Legal Networks***. Oxford: Oxford University Press, 2017. Pp. 239. £64. ISBN: 9780190622343.

Juan Pablo Scarfi's *The Hidden History of International Law in the Americas* is part dual legal biography of James Brown Scott and Alejandro Alvarez, part institutional history of the American Institute of International Law (AAIL) – the organization they created with the financial support of the Carnegie Endowment for International Peace (CEIP) – and part exploration of 'American international law', a set of ideas principally set forth by Scott and Alvarez through the AAIL. These ideas justified US imperialism and interventionism in the Americas (particularly in Cuba) as part of a larger pan-American project that spanned from the late 19th century into the 1930s, and they became operational through 'legal and diplomatic networks of hegemonic interactions in the Americas' that were facilitated by the AAIL (at xviii). It is to this network and particularly to the 'unveiling' of American international law's underlying 'ethnocentric, elitist, missionary, and hegemonic' beliefs and 'civilizing imperial aspirations' that the title's adjective 'hidden' refers (at 188).

Scarfi's story, though, begins with the focus not on Scott and Alvarez or the AAIL but, rather, on Elihu Root. Root and the pan-Americanism he promoted sought to maintain and extend US economic leadership in the Americas. A hegemony based on consent, founded on notions of 'shared hemispheric histories, institutions, and ideals' and codified by rules, pan-Americanism promoted continental solidarity, the international rule of law, the peaceful settlement of disputes through judicial mechanisms, sovereign equality and the codification of international law (at 3, 21). As secretary of state, Root (who as secretary of war had previously drafted much of what would be called the Platt Amendment) advocated these beliefs during his 1906 tour of South America and particularly at the third Pan-American Conference in Rio de Janeiro. That same year, the American Society of International Law was founded, with Root as its inaugural president and Scott as a founder. By 1910, so too was the CEIP, also with Root (now a US senator) as its first president and with Scott (who had previously served as solicitor to Root at the Department of State) as general secretary and director of the International Law Division.

The year before, Scott and Alvarez, a Chilean lawyer and foreign ministry adviser, had met. Alvarez had independently already begun to think explicitly about an American international law, distinctive from the European version. (The term itself originated in 1844 with Juan Bautista Alberdi, though it seems without much consequence at the time.) Alvarez would publish his ideas as a 1909 article in the *American Journal of International Law*, of which Scott was editor-in-chief, and, the following year, as a book, *Le droit international américain: Son fondement, sa nature*.¹ Together in 1911, Scott and Alvarez proposed to Root the establishment of the AAIL, a western hemisphere counterpart to the Institut de droit international. The organization

¹ A. Alvarez, *Le droit international américain: Son fondement, sa nature* (1910).